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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 945

MASSEY-FERGUSON LIMITED, a corporation,
Petitioner,

vs.

INTERMOUNTAIN FORD TRACTOR SALES COMPANY, a corporation, CASSIA EQUIP- a corporation, CHISHOLM BROTHERS FARM EQUIPMENT CO., a corporation, and CHARLES W. BULLEN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH L. ALIOTO
111 Sutter Street
San Francisco, California
BRIGHAM E. ROBERTS
Judge Building
Salt Lake City, Utah

Of Counsel:
DANIEL L. BERMAN
G. JOSEPH BERTAIN

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Respondents file this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming *per curiam* the judgment of the United States District Court for the District of Utah, holding that the petitioner, Massey-Ferguson Limited, could be sued and served in a private antitrust action commenced in that district under Section 12 of the Clayton Act, 15 U.S.C. §22 (1958).

Jurisdiction and Statute Involved

Respondents agree that petitioner has invoked this Court's jurisdiction under 28 U.S.C. §1254(1) and that the federal statute involved in the determination of the question presented is Section 12 of the Clayton Act, 15 U.S.C. §22 (1958). However, respondents contend that based on the facts as established by the decisions of the lower courts and overwhelmingly supported by the record, petitioner has mis-stated the question presented.*

The Question Presented

The question presented is:

Whether a Canadian corporation can immunize itself from suit and service under Section 12 of the Clayton Act by the mere interposition of a wholly owned American subsidiary when the parent Canadian corporation through its own operational unit has circumvented and overridden the subsidiary and taken direct and detailed control of the business activities conducted in the subsidiary's name.

Statement of the Case

Massey-Ferguson Limited (hereinafter referred to as "LIMITED") and three of its subsidiaries, including its wholly owned subsidiary, Massey-Ferguson, Inc. (hereinafter referred to as "INC.") were named as defendants in a private antitrust action commenced by the respondents in the Utah district. LIMITED is

* In this respect it should be noted that petitioner in its statement of the case, pp. 3-6 of its petition, only makes one citation to the record relating to its business operations.

engaged in the manufacture and distribution of farm and industrial equipment and other related products on a worldwide basis. In 1961, its consolidated net sales were in excess of $500,000,000.00. In the United States, INC. also manufactures farm and industrial equipment and markets this equipment through approximately 2,050 independent franchised dealers and 34 company stores, which are operated by company personnel. It is these company stores, one of which is located at Tremonton, Utah, (R. 17, 28)* that are directly involved in the alleged antitrust violations. INC. also markets, through these company stores and its dealers, products such as balers, rakes, plows, and combines, which are manufactured by LIMITED in Canada. There is no duplication in manufacturing facilities between the two companies (R. 171, 173).

In Canada, LIMITED manufactures farm and industrial equipment and markets this equipment and equipment manufactured by INC. through independent dealers. LIMITED does not operate any company stores in Canada (R. 275).

LIMITED's control and domination of INC.'s American operations goes far beyond the utilization of common management (R. 26, 180) and the formulation of major policy guide lines for its subsidiary (R. 191, 197). In November of 1959, LIMITED integrated its Canadian operations and INC.'s American operations into one operational entity — North American Operations (R. 168, 194, 220, 315, 316). This unit has its own staff of several hundred people (R. 104) and is headquartered as is INC.'s and LIMITED's top manage-

* References to "R" refer to the transcript of record which has been filed by the petitioner pursuant to Rule 21(1) of this Court.

ment in Toronto, Canada. Mr. Staiger, the general manager of North American Operations, President of INC. and Vice-President of LIMITED (R. 25, 95) stated that North American Operations is one of LIMITED's operating units (R. 103) and further confirmed LIMITED's direct control of North American Operations when he testified:

> Q. "And who is your immediate superior as general manager of the North American Operations unit?
>
> A. "All general managers of all operations report directly to the President of Massey-Ferguson Limited." (R. 103)

North American Operations controls the manufacturing and marketing operations of both LIMITED in Canada and INC. in the United States (R. 168). This control is clearly demonstrated by the RETAIL STORE OPERATIONS MANUAL (Pl. 1 Ex. 2) which is promulgated by the North American Operations unit and governs the operations of the company stores in the United States in minute detail.

The District Court found that "as a practical matter the parent company through the 'North American Operations' directs the detailed activities of the American company, including the operation of company stores in both Utah and Idaho." Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930, 935 (D. Utah 1962) and further that

> "this 'North American Operations' appears to be not merely a council of officers from the respective corporations, each acting in separate capacities and with respect only to the particular corporation which he represents, but essentially

> another entity in which separate corporate functions are merged in many respects, employing as such numerous assistants and employees and often acting directly with subsidiary corporate activities rather than through the top management of the respective corporations." *Id.*

Based on these findings, the District Court held that Massey-Ferguson Limited was subject to suit and service in Utah and that it was also validly served in Idaho and Michigan.

The Court of Appeals affirmed the District Court's judgment per curiam and agreed

> "with the Trial Court that by reason of its interlocking and integrated control of 'North American Operations' the appellant Canadian corporation was enabled to and did direct 'the detailed activities of the American corporation including the operation of company stores in both Utah and Idaho' . . ." *Massey-Ferguson Limited v. Intermountain Ford Tractors Sales Co.*, 325 F.2d 713, 714 (10th Cir. 1963).

The petitioner does not seek to review the findings of the District Court which have been approved by the Tenth Circuit and it is these findings which present the question that is subject to this Court's discretionary appellate jurisdiction. Respondents contend that the question presented on the findings of the lower court is not worthy of review by this Court.

Reasons for Denying the Writ

I.

The Court of Appeals correctly applied the controlling decision of this Court.

On the question presented, *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948) and not

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925) is the controlling decision of this Court.

Petitioner asserts, as it has in the lower courts, that the tests of venue and service under Section 12 of the Clayton Act are controlled by *Cannon Mfg. Co. v. Cudahy Packing Co.*, supra. The *Cudahy* case was not an antitrust case and did not involve the application of Section 12 of the Clayton Act or of Section 12's predecessor provision, Section 7 of the Sherman Anti-Trust Act. *Cudahy* involved the question of the service of process in a diversity action on the parent corporation of a subsidiary that was unquestionably subject to service. The Court held that the parent was not subject to service even though the subsidiary was dominated by the parent through interlocking management. The Court, however, did find that the subsidiary was not acting as the agent of the parent, *Ibid.* at p. 335, and that the corporate separation "though perhaps formal was real." *Ibid.* at p. 337.

While some question may exist as to the current vitality of the *Cudahy* doctrine as it controls service of process in non-antitrust cases, compare *Curtis Pub. Co. v. Cassel*, 302 F.2d 132 (10th Cir. 1962) with *Harris v. Deere & Co.*, 223 F.2d 161 (4th Cir. 1955), this Court has already determined that this doctrine does not supply the test of venue and service under Section 12 of the Clayton Act.

In *United States v. Scophony*, this Court reversed a district court decision and held that in an antitrust case a British corporation, whose American subsidiary had been made a party to the litigation, could be sued and served in the Southern District of New York under Section 12 of the Clayton Act. The Court in examining

the standards that control venue and service in civil antitrust suits against corporations stated that the venue requirements of Section 12 had been adopted by Congress to slough off the highly technical distinctions that prior cases had glossed upon the standard "resides or is found" of Section 7 of the Sherman Anti-Trust Act. The Court found that in Section 12, Congress had adopted a "practical, everyday business or commercial concept of doing or carrying on business of any substantial character . . ." *Ibid.* at p. 807, as the test of venue. The Court noted that such a test made effective Congress' remedial purpose in enacting Section 12 by relieving

> "persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence." *Ibid.* at p. 808.

The Court in reaching its decision expressly rejected Cudahy as establishing the test of venue under Section 12. The Court had been urged to follow the "Court's decisions interpreting 'found' under Section 7 and similar requirements in application to manufacturing and selling companies[23] . . ." *U.S. v. Scophony Corp. of America*, supra, at pp. 812-813. The first case cited by the Court in footnote 23 as an example of a decision that set forth such "similar requirements" applicable to "manufacturing and selling companies" was *Cannon Mfg. Co. v. Cudahy Packing Co.*, supra. The Court rejected this authority stating "obviously this view . . . of the determinative legal approach is at wide variance from the ones we have taken in dealing with the question of venue." *U.S. v. Scophony Corp. of America*, supra at p. 813.

This Court in *Scophony*, moreover, not only rejected *Cudahy* as supplying the test of venue under Section 12, it also rejected *Cudahy* as supplying the test of service under Section 12. The defendant in *Scophony* in support of its position on service relied on language in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) which indicated that in regard to service of process, Section 12 merely carried forward pre-existing law. This Court in *Scophony* characterized the language in *Eastman* as "no more than dictum" *United States v. Scophony Corporation of America*, supra, at 809, and noted that under Section 12, service on domestic corporations such the defendant in *Eastman* did not involve a practical problem of private antitrust enforcement. While the Court declined to pass on the *Eastman* dictum, it decided that Section 12 did not adopt the doctrine of the "manufacturing and selling cases," e.g., *Cudahy*, as the test of service. In this respect, this Court in *Scophony* said:

> "For present purposes those decisions (the manufacturing and selling cases) may be left untouched for the facts and situations in which they have arisen and to which they have been applied. But there could be no valid object in expanding their pulverizing approach to situations as different and distinct as this one, comprehended within neither their rulings nor their effects. More especially would such an extension be inappropriate, when it is recalled that §12 governs venue and service in antitrust suits against corporations. For, in cases against companies incorporated outside the United States, that extension would bring back all the obstacles to enforcement of antitrust policies and remedies which existed for domestic corporations before §12 was enacted to give relief from those obstacles. Even though venue were clearly estab-

> lished, as here, the extension often would make valid service impossible, since process could not be issued to run for such corporations to the foreign countries of which they are 'inhabitants.' We are unwilling to construe §12 in a manner to bring back the evils it abolished, for situations not foreclosed by prior decisions, and thus to defeat its policy together with that of the anti-trust laws, so as to make another amendment necessary." *Ibid.* at p. 817 (Material in parentheses added).

Contrary to the petitioner's contention (Pet. Br. at p. 8) businessmen in the United States and abroad need have no doubt as to whether Cudahy supplies the determinative tests of venue and service under Section 12 of the Clayton Act — for this Court has told them it does not. The petitioner not only has failed to show a conflict between the Tenth Circuit's decision in this case and the controlling decision of this Court, but it has failed to show any conflict between the Tenth Circuit's decision and the decisions of other Circuit Courts dealing with the scope of the venue and service provisions of Section 12 of the Clayton Act. The petitioner has relied on three Circuit decisions to establish such a conflict, but not one of these decisions relied on involves the application of either the service or venue provisions of Section 12 of the Clayton Act. See *Manville Boiler Co. v. Columbia Boiler Co. of Pottstown*, 269 F.2d 600 (4th Cir. 1959); *Harris v. Deere and Company*, 223 F. 2d 161 (4th Cir. 1955); and *Gravely Motor Plow & Cultivator Co. v. H. F. Carter Co.*, 193 F.2d 158 (9th Cir. 1951.)

On the basis of authority, the only issue as to whether certiorari should be granted is whether the Tenth Circuit decision correctly followed this Court's

decision in the *Scophony* case. In view of LIMITED's unique domination and control of INC.'s American operations, including the company stores, through its operating unit, North American Operations, the only conclusion that could be drawn under the "practical everyday business" test of *Scophony* was that LIMITED was subject to suit in the Utah District. Moreover, regardless of whether any difference exists between the test of venue and service under Section 12, the Tenth Circuit under *Scophony* was also correct in holding that the petitioner was subject to service. To hold otherwise would have exalted corporate fiction over the realities of petitioner's method of doing business, and thus have permitted foreign corporations to evade the enforcement of our antitrust laws. It was to avoid such evasion that the Supreme Court rejected the *Cudahy* doctrine in *Scophony* as a test of service on foreign corporations.

II.

The decision of the Tenth Circuit is supported by settled considerations of public policy.

The decision of the Tenth Circuit does not hold every foreign parent corporation subject to suit and service under Section 12 merely as a result of its stock interest in a domestic subsidiary corporation. The decision of the Tenth Circuit does hold a foreign parent corporation subject to antitrust enforcement, when such foreign parent corporation in the exercise of its business judgment decides to circumvent and override its domestic subsidiary's control of the domestic operations conducted in the subsidiary's name.

Such a decision will not as claimed by petitioner result in "extraordinary expansion of the jurisdiction of Federal courts." On the contrary, such decision is necessary to prevent evasion of our antitrust laws by foreign corporations and to implement Congressional policy in enacting Section 12. Section 12, as this Court noted in *Scophony*, was enacted to relieve persons of the "often insuperable obstacles" of resorting to distant forums for redress of wrongs inflicted in the places of their business. Thus the Court in *Scophony* recognized that if private antitrust suits are to aid the public in the enforcement of the antitrust laws, then private persons must be given an effective opportunity to seek redress for claimed violations. These considerations have peculiar force in regard to foreign corporations since the application of Section 12 to such corporations will determine not only where such corporations can be sued, but whether they can be sued at all. The opportunity to sue foreign parent corporations, moreover, may well be essential to successful antitrust enforcement not only against the parent corporation, but also against the foreign parent corporation's domestic subsidiary.

Section 12 does not provide for suit and service in personal injury actions. It is not a question, as petitioner intimates, of whether a subsidiary can satisfy a judgment. The question is whether a plaintiff can properly prepare and prosecute its antitrust claims involving the integrated business operations of a foreign parent corporation which utilizes domestic subsidiaries in such operations but actually controls all such operations itself without making the parent corporation a party. In this case, for instance, discovery against LIMITED has been stayed pending the outcome of this interlocu-

tory appeal. Such discovery in litigation where the "proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot." *Poller v. C.B.S.*, 368 U.S. 364 (1962) will undoubtedly be essential to the prosecution of respondent's claims. It is not enough to say, as petitioner argues, that "all civilized countries" have procedures for collecting information for use in foreign litigation. Such procedures may be inadequate, see *Societe' Internationale v. Rogers*, 357 U.S. 197 (1958) and statement of Premier of Ontario (Pet. Br. p. 44), or the utilization of such procedures may be impossible as a practical matter.

In light of the Congressional policy in enacting Section 12 and in light of the well settled public policy of encouraging private enforcement of our antitrust laws, no further decision of this Court is necessary to determine that a foreign corporation cannot utilize a domestic subsidiary to evade the enforcement of our antitrust laws, and on the question presented, that is the only consequence of the Tenth Circuit's decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JOSEPH L. ALIOTO
BRIGHAM E. ROBERTS
Counsel for Respondents

Of Counsel:
DANIEL L. BERMAN
G. JOSEPH BERTAIN

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